1991

Reed v. Forrer : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
BRIEF

URT OF THE STATE OF UTAH

HENRY H. FORRER,

Plaintiff,

-vs-

STUART REED, RUSSELL REED, DONALD REED, FRANKLIN REED, MARGARET REED CORDIE MAE REED and LAWANNA KAY REED,

Defendants and Counter-Plaintiffs.

-vs-

HENRY H. FORRER, ROBERT SATHER, EZILDA HENDRICKS, CHARLES HENDRICKS) ROGER L. ROBERSON and ETHEL LaVERNIA ROBERSON,

Counter-Defendants and Appellants.

Case No. 14572

APPELLANTS' BRIEF FOR RE-HEARING

Petition for Re-hearing Before the Supreme Court of the Decision Dated February 9, 1977, regarding the Appeal from Judgment of the Fourth District Court, Uintah County, State of Utah, The Honorable George E. Ballif, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

HENRY H. FORRER, Plaintiff, -vs- STUART REED, RUSSELL REED, DONALD REED, FRANKLIN REED, MARGARET REED CORDIE MAE REED and LAWANNA KAY REED, Defendants and Counter-Plaintiffs. -vs- HENRY H. FORRER, ROBERT SATHER, EZILDA HENDRICKS, CHARLES HENDRICKS ROGER L. ROBERSON and ETHEL LaVERNIA ROBERSON, Counter-Defendants and Appellants.	Case No. 14572

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STATEMENT

Upon appeal to the Supreme Court, from an adverse decision of an Honorable Judge of the Fourth Judicial District Court, the Supreme Court in a unanimous decision written by Justice Hall, upheld the lower court ruling. Two of the appellants have filed a petition herein, pursuant to Rule 76 (e) of the Utah Rules of Civil Procedure, requesting this court to reconsider its decision, alleging in support thereof, that this honorable court erred in ruling, and/or failed to adequately consider certain arguments raised on appeal. The petitioners restate, by reference, the facts as set forth in their original brief.

RELIEF SOUGHT ON REHEARING

The appellants would urge the court to reconsider its decision of February 9, 1977, and to reverse said decision, either in whole or in part, as follows:

1. To reverse the decision that the guardianship was a "nullity", and to allow the petitioners the benefit of a validly appointed guardian as a bar to the foreclosure of the subject mortgage, or that failing, then in the alternative;

2. To divide the mortgage into the seven amounts set forth in the mortgage, and reduce the mortgage by the sum attributed to each of the defendants not counter-claiming herein.

ARGUMENT

POINT I

THE RIGHT TO PETITION FOR REHEARING REQUIRES NO PRECEDING ACTS BY THE PETITIONERS.

The Utah Rules of Civil Procedure provides as follows:

> "Within 20 days after the filing of the decision of the Supreme Court, either party may petition the court for a rehearing. The petition shall state briefly the points wherein it is alleged that the appellate court has erred. The petition shall be supported by a brief of the authorities relied upon to sustain the points listed in such petition. Both the petition and brief in support thereof must be prepared in accordance with the requirements of Rule 75(p), and shall be served upon the adverse party prior to filing." (Rule 76(e)(1) Utah Rules of Civil Procedure.)

This rule requires the party requesting a rehearing to do the following:

A. A petition for rehearing within twenty days.

B. A brief to support the petition.

C. To be done in accordance with Rule 75(p) U.R.C.P.

Counsel for petitioners apologizes if the rule of the court would require or prefer that both the petition and brief in support of the petition, be filed simultaneous. Inasmuch as that procedure was not clear to this counsel, and he was under the impression that the brief could be filed later, counsel did so, and apologizes to this court, and assures the court, that the failure was not meant as either a discourtesy or an attempt to delay these proceedings.

There is nothing in the rules that requires a party to have either filed a response brief or to request oral arguments in order to petition for a rehearing. The right to request a rehearing is founded on the principle that a party is grieved by a decision of the Supreme Court, and reasonably believes that in making that decision, the court either failed to consider some material point, or that it erred in its conclusion, or that some matter has been discovered which was unknown at the time of original hearing. (See In re McKnight, 4 U 237, 9 P.299, Brown v. Piekard, 4 U. 292, 9 P.573, 11 P. 512.)

It is so obvious that a party cannot be grieved by a decision of the court until a decision is reached, that for any person to argue or suggest that the failure to file a responsive brief or to request oral arguments is a waiver of the right to a rehearing, is incredulous.

POINT II

THE GUARDIANSHIP OF THESE DEFENDANTS SHOULD NOT BE NULLIFIED BY OR IN THESE PROCEEDINGS.

The decision of this court would suggest that the appellants did not address themselves on appeal to the ruling of the trial

court regarding the "nullity" of the guardianship proceedings. Petitioners would suggest that in fact, the trial court did not directly rule on the question of the "nullity" of the guardianship, that nevertheless, the appellants brief addressed itself in several particulars to the guardianship and the results of a "valid" guardianship on the mortgage in question and the relative rights of the appellants and the defendants by reason of the same. Inherent in the arguments of the appellants, was the fact that the appellants and the general public were entitled to both assume and presume that the guardianship proceedings were exactly what another division of the lower court had determined them to be, i. e., valid acts, and that if they were not valid, that the proper place to pursue the same was by the defendants against the guardian, in the guardianship file in that court. The question of the validity of that guardianship was not an issue before the lower court, (see Pre-Trial Stipulation), but rather, the parties stipulated: that a guardianship did in fact exist, (thus concluding or presuming the same valid); that the mortgage by the guardian to the defendants had never been included as an asset of that guardianship; and, that there was no record that it was or was not paid. When Ezilda Hendricks was appointed guardian, she was requi to post a good and sufficient surety, and only after due and proper notice was given and at a hearing duly held, with evidence introduced as required by law. That appointment was nearly fifteen (15) years old at the time of the commencement of this law suit. At that time, no person or party, including the defendants, were entitled to directly attack the guardianship proceeding due to the operation of the statute of limitations, or

laches, or by operation of law, except perhaps in the guardianship file itself. It thus seems improper for either this court or the trial court to determine in a separate and unrelated matter, that the guardianship was a "nullity", because the guardian failed to include a mortgage as part of the trust estate. It would seem to the appellants that the more proper course to follow would be for the court to determine that the guardian's actions relating to the mortgage were such that a cause of action might lie between the minors and their guardian, but that the effects of that failure or any other act, could not be tried in this proceedings, since to do so would be without the benefit of proper notice postings, etc., as required in guardianship matters, and with out ALL necessary persons being parties.

The de facto result of the decision issued by this court, is to judicially void a guardianship proceedings, without due process of law. Thus, without properly pleading the acts leading to a conclusion that the guardianship was a nullity; without testimony on that issue; without proper service on ALL interested or required parties to the matter; without the required posting in guardianship matters, etc., the court has determined that the guardianship was a nullity. Such a result seems to be a patent error, and places innocent and interested third parties who have relied on the guardianship proceedings, in possible peril of their property rights. A person should be entitled to rely upon the prior decisions of the court that have consistently held that if minors have a duly appointed guardian, that the statute of limitations will run as to said minors, by reason of the guardian. (See Parr v. Zions First National Bank 13 Utah 2d 404, 375 P.2d 461.)

In this particular fact situation, because of the court records, the appellants knew of the duly appointed guardian for most of the defendants; they knew that in 1967, that the guardian, who was the defendants' mother, had attempted to quiet title to the subject property, and had failed; they were aware that this court had previously held that the appointment of a guardian caused the statute of limitations to run against minors, and that the "tolling" of the statute because of the disability of the minor, ended with the appointment of a guardian. Should the opinion of the court remain unchanged, then the law in this state relative to the effect of the appointment of guardians shall of necessity undergo a radical change. Any person dealing with: a guardian; or, with property that any time involved a guardian; or, a person who may have had a guardian, will have to inquire or ascertain as to whether the guardian ever borrowed money from the minors or mortgaged property to the minors, because if such in fact occurred, and the guardian did not include the same in the inventory or repay the same, then the entire guardianship proceedings would be subject to being declared a nullity, in <u>any</u> proceedings and the third party would be placed in jeopardy and would act at his own peril. In the instant case, we have a situation where the guardianshi has now been declared to be null and void, i. e., it never existed, and since this was done outside of the guardianship file itself, we have no idea of how many other persons or parties have relied upon that proceeding in their dealing with the guardian and the estate in the hands of the guardian, who may now also be hurt, or have their reliance on the existance of the guardianship, declared to be a "nullity." If the guardianship proceeding is null or

void as to this matter, then surely the guardianship is completely void, because it cannot be just a "little bit" void, and notwithstanding that determination by the court, there will be nothing in the guardianship file to indicate that it has been judicially determined to be a nullity. In addition, what now happens to all other proceedings in that file and persons who have in good faith dealt with the guardian? The only consistent position is to declare those acts a nullity too. The result of such a decision is not only unconscionable, but is obviously wrong and unfair, for it has the same effect and produces the same results as an ex post facto law. The true remedy and recourse for the defendants and counter-claimants who did not have their mortgage timely foreclosed, should be against their guardian, whoever that guardian might be. While, as the court's decision suggests, it is highly unlikely that a guardian would sue herself to foreclose the mortgage, it must be remembered that she did take certain oaths, and, just such a fact situation is undoubtedly one of the reasons why this state has adopted a statute requiring all guardians appointed by the court must post bond or surety, no matter who they are, or, the oath they take, before letters of guardianship will issue, just as this guardian did. That bond is to protect minors against just such an occurrence is had as when a guardian will not sue herself. Because this guardian did not sue herself, and because these defendants chose not to sue their mother directly, or to even question her regarding her failure to "timely" foreclose their mortgage, should not be a reason for this court to change the law relative to the running of the statute of

limitations as to minors with duly appointed guardians. This "new" rule by the court will give all minors another way of accomplishing what they failed to do by neglecting to sue their guardian for failing to marshall their estate, etc., and has the effect of judicially altering the statutes regarding minors, their guardians, and limitation of actions, without the benefit of legislation.

Appellants urge, that far more mischief will be done by the court declaring the guardianship to be a nullity due to the guardian's failure to marshall an asset of the estate, than good can possibly result from adopting such a new principle of law. IF we were considering only the guardianship proceeding, and if proper notices of the proceedings were sent to the parties involved in the proceeding, including the sureties of the guardian, and evidence was adduced for the express purpose of the minors attempting to void their guardianship by their mother, then perhaps the result reached by the court would be more palatable to the appellants, and consistent with the prior rulings of this court. However, the only relevant stipulated facts before the court relative to the guardianship was that "on March 19, 1958, Ezilda Hendricks was appointed by this court as guardian of her minor children. That guardianship action, Civil No. 1458, was funded from deposits of other moneys from the individual trust accounts with the Bureau, but said action did not list the mortgage as an asset." There was no stipulation or statement in the rest of the agreed facts that in any way questioned the validity of that guardianship proceedings, nor was any issue framed for trial

to suggest or would lead the court to conclude that the "administration of the guardianship estate was a nullity." In fact, the lower court did not make a specific finding as to that point, nor is the decision of the trial court explicit in such a conclusion. Nevertheless, appellants feel that they reasonably objected on appeal, to any findings of the trial court that would lead to the conclusion that the guardianship was a "nullity", by appellants repeated arguments that there was, in fact, a duly appointed guardian of the minor defendants from and after March 19, 1958. The mere fact that the file of the guardianship proceeding was not the file or action in issue before this court, should have been sufficient reasoning or basis for the court to have refused to reach a conclusion that "the administration of the guardianship estate was a nullity." For that conclusion or decision of the court to stand, will, as previously urged, open all transactions previously approved by the court in the guardianship action, to being set aside or vacated, even though relied upon in good faith by other innocent third parties, including the surety of the guardian. That is the only logical result that can be expected from a conclusion that the guardianship was a "nullity", unless of course it is just "a little bit null".

Additional problems can also be assumed from such a conclusion, because according to the stipulated facts, "In 1962 or 1963, First Security Bank of Utah, N. A., Trust Department, became the trustee of the defendants' estates. The funds remaining in the hands of the guardian, Ezilda Van Hendricks, were turned over to that trustee....". Suppose that the mortgaged premises are now

sold to satisfy the judgment of foreclosure, and the proceeds from said sale are insufficient to satisfy the sum due and owing to the defendants, in such an event, will these defendants now be able to rely upon the authority of these proceedings and this decision to commence an action against First Security Bank for failing, as their duly appointed trustee, to marshall the assets of their estate, and have the court rule that after these many years that those proceedings were also a nullity, and that any and all transactions concluded or conducted by First Security in the proceedings relative to its acts as trustee, can now be set aside as a nullity and as if they had never been done? While the absurdity of such a result is evident, nevertheless, that very conclusion seems very analogous to the results that the decision reached by the court would obtain. For such a line of case law to develop in this state seems to be a very dangerous and improper thing and will leave all guardianship proceedings open to collateral and far-reaching attack, at any time, without regard to statutes, determinal reliance, laches, etc. Whether appellants directly addressed themselves to that matter in their brief, or whether the trial court went that far in its decision, seems to be secondary to the greater issue, of what will be the result if the precedent of such a decision should remain. Petitioners respectfully urge the Honorable Justices of this court to reconsider their decision relative to the same, and to conclude that although the guardian did act in a form and manner that was subject to having her removed as the guardian of the minors, that the proper method for her removal was pursuant to the terms of Title 75-6-1 and 75-13-9

of the Utah Code Annotated, and not by or through an unrelated proceeding. Appellants believe and again assert that the real thrust of their appeal and the arguments raised in their brief was based upon the validity of the guardianship proceedings, and the belief in that validity was based upon the assumption that the guardian was properly appointed to serve, and that until she was removed in the manner prescribed by the statutes of this state, or, until a direct attack upon her administration was commenced in the guardianship proceedings itself, that she would continue to so serve. (See arguments contained in Point III of Appellants' brief, which point contained eight of the fourteen pages of appellants argument.)

In view of the foregoing, the petitioners respectfully urge the court to conclude that the matter of the validity of the guardianship proceedings was never before the court; that the validity of the guardianship could not be attacked in this action, but only by the defendants properly filing a claim so as to make the guardianship file a part of the proceedings, or by filing in the guardianship file itself, thereby securing the posting and giving of the required notices, the joinder of all interested and essential parties, including the surety, the introduction of evidence on that particular issue, etc., and, that to do less than that would cause a significant and radical departure from the normal procedures and rules of this court and the statutes of this state, as well as cause no end of havoc and mischief.

POINT III

A DEFAULTING DEFENDANT IS NOT ENTITLED TO THE BENEFIT OF AN UNASSERTED COUNTER-CLAIM.

The petitioners have little quarrel with the court's ruling that there may be situations where the "successful defense of some of several co-defendants may inure to the benefit of a defaulting defendant." However, the petitioners urge that this seems to be inappropriate proceedings for the court to apply that conclusion. The defendants, as a group, are much more than just co-defendants in a law suit, where the defaulting defendants benefit or obtain a benefit from the defense of the defendants who do appear. Surely a counter-claim involving the ability to collect money or to foreclose a mortgage against property in lieu thereof, is much, much more than a defense to a claim of a plaintiff. Consider the following:

First, only a part of the defendants asserted a counter-claim, namely, Franklin Reed, Margaret Sue Reed, Cordie Mae Reed and LaWanna Kay Reed.

Second, that fact would indicate or suggest that the other defendants did not wish to assert their claim under the mortgage, or that their claim had been satisfied. This seems particularly applicable where each of the mortgagees have a stated amount of contribution to the mortgagor, and the sum is identified in the mortgage instrument itself.

Third, for the court to conclude that because part of the mortgagees claim that their contribution to the mortgage was not satisfied, that the other mortgagees

claim was likewise not satisfied, is giving the defaulting defendants far more than is either just or equitable.

The stipulated facts were that "(t)here is no record of payment or lack of payment by Ezilda and Charles Hendricks to the defendants of the subject mortgage." The petitioners did not enjoy that type of "relationship" with the defendants that would make them privy to that type of information. Surely, the defendants, as brothers and sisters, had that type of information, and both those defendants who answered and those who did not answer, in effect did admit that the defendants not answering had no claim to assert. If the mortgagors had repaid any of their children, any part or all of their contribution to the mortgage, then the mortgagors would have been entitled to have the mortgage reduced by the amount that they paid to their children. It would seem to the petitioners, that the mere refusal of the three (3) defendants to answer the plaintiffs complaint, was an admission that their portion of the contribution had been repaid to them. When the four answering brothers and sisters neglected to include their older brothers and sister in the counter-claim, was that a further acknowledgement that they considered the contribution of their brothers and sister to have been repaid? The appellants urge that they are entitled to the presumption that those defendants who did not counterclaim, had been satisfied as to their portion of the contribution to the mortgage. IF the mortgage had merely recited that the mortgage was for an aggregate sum only, and had no reference to the contributions by each of the defendants, then the result reached by the court would be understandable. However, where the stipulated facts and the mortgage are as they are,

and where only four (4) of the seven (7) defendants wish to assert that the mortgage is unsatisfied, and bother to file a counterclaim to foreclose the same, then, in such event, the petitioners urge that it is more reasonable to conclude that the unpaid amount due on the mortgage is that sum contributed by the four that bothered to counterclaim, and that the other three are presumed to have been paid.

Petitioners thus urge that the defaulting defendants, who did not file a counterclaim, should surely be barred from any recovery, and that neither law nor equity should allow the other defendants, the counter-claimants, to collect or secure judgment for the benefit of those defaulting defendants, who made their election to make no claim for contribution or otherwise.

POINT IV

APPELLATE COURT SHOULD RECONSIDER BOTH THE STIPULATED FACTS AND THE LAW IN THIS PROCEEDING.

Due to the unusal nature of the entire proceedings, and the obvious lack of appellants' personal knowledge regarding the dealings between the defendants and their parents, the facts were all stipulated to in writing at the trial of the matter. No witnesses were called, and none testified. The trial court thus had no opportunity to personally observe witnesses, their demeanor, their conduct, their believability, or lack of believability. It would seem, that on appeal, that the findings of fact, etc., by the lower court should be given no greater credence or effect than tha which could or might be reached by this court. This relates not only to the question of the foreclosure of the mortgage by part of the defendants, but as to the evidence or lack of evidence

before the court relative to the guardianship proceeding, for the stipulated facts should not be subject to that many different interpretations, since there were no witnesses for the trial court to personally scrutinize, etc. Petitioners thus urge this court to review its previous decision, and the decision of the lower court in light of the same.

CONCLUSION

Petitioners urge the court to reconsider its decision that the guardianship was a nullity, for the reason that such a decision was improperly reached and concluded in this proceeding, and, was not based upon facts sufficient to conclude the same. If the court will reconsider its decision on the "nullity" of the guardianship, then petitioners request this court to also reconsider the effect of that guardianship on the question of foreclosure of the mortgage, the statute of limitations, and the right of the petitioners to assert the bar of the statute of limitations to defendants foreclosure of the same.

In the event the court shall refuse to reconsider its decision on the "nullity" of the guardianship, then the petitioners still submit that the court should reconsider its' decision as to the effect of that portion of the mortgage attributed to contributio by the three defaulting defendants, i.e., that the mortgage should be reduced by the amount of that contribution.

Respectfully submitted,

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